

The enforcement of EC rights against national authorities and the influence of Köbler and Kühne & Heitz on Italian administrative law

Citation for published version (APA):

Elia Antonio, M. (2006). *The enforcement of EC rights against national authorities and the influence of Köbler and Kühne & Heitz on Italian administrative law: Opening Pandora's box?* (1 ed.) Faculty of Law, Universiteit Maastricht. Maastricht Faculty of Law Working Papers Vol. 2006 No. 4

Document status and date:

Published: 01/01/2006

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

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opening Pandora's box?

Mariolina Eliantonio



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Published in Maastricht, April 2006

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This paper is to be cited as Maastricht Faculty of Law Working Paper 2006/4

**The enforcement of EC rights against national authorities and the influence of
Köbler and *Kühne & Heitz* on Italian administrative law: opening Pandora's box?**

Mariolina Eliantonio¹

Abstract: The paper analyses the impact of the *Köbler* and the *Kühne & Heitz* rulings on Italian system of administrative justice. These rulings, issued recently by the European Court of Justice, set out new obligations for national courts and administrative bodies with respect to (i) the principle of State liability for violations of EC law committed by national courts adjudicating at last instance and (ii) the obligation to re-examine final administrative decisions, which have been adopted in violation of EC law. The purpose of the contribution is to evaluate whether, in the Italian legal system, these rulings could potentially bring any changes in the current rules or have contributed to trigger a process of change, or whether the relevant national provisions already provide a sufficient standard of protection for individuals' rights.

Keywords: European law, Italian administrative law, domestic enforcement of EC law, State liability, annulment of administrative measures

1. Introduction

It was 1993 when Roberto Caranta, a distinguished Italian administrative law professor, commented upon a request for a preliminary ruling sent by the Regional Administrative Court of Lombardia, concerning the compatibility with European law of a national procedural rule which prevented the administrative judge from asking an independent expert to carry out a technical assessment in the context of the judicial fact-finding

¹ PhD Researcher, Maastricht University, Faculty of Law. This paper is an improved and updated version of the author's contribution presented at the Workshop on Public Law held during the yearly *Ius Commune* congress (Edinburgh, 1-2 December 2005). The author would like to thank Prof. Dr. E. Vos for her useful comments on earlier drafts of this contribution.

activity². The case came to be known, albeit not with the same degree of fame as other preliminary rulings, as the case *Comitato di Coordinamento per la Difesa della Cava*³.

These are Caranta's somewhat "prophetical" words: "What could simply look like a mere action for annulment against measures concerning the location of waste discharge plants seems to be capable, in the hands of a Europe-friendly court, to give rise to new and extremely complex problems. If this is indeed the case, it seems difficult to deny that the integration of our system of administrative justice in the EC legal system represents the legal equivalent of opening Pandora's box"⁴.

Recently, two cases delivered by the European Court of Justice (ECJ) have somehow contributed to flesh out the Community "mandate"⁵ of national courts and administrations and have called in question the well known principle of national procedural autonomy: the *Köbler* case extended the principle of State liability also vis-à-vis the judiciary⁶, while the *Kühne & Heitz* ruling set out a duty for administrative authorities to re-examine final administrative measures, which were adopted in violation of EC law.

The aim of this paper is to analyse the impact of these rulings on the Italian system of administrative justice, in order to evaluate whether they could potentially bring any changes in the current rules or have contributed to trigger a process of change, or whether the relevant national provisions already provide a sufficient standard of protection for individuals' rights. After this analysis, some conclusions are drawn as to whether, and to what extent, it could be argued, as Caranta predicted 10 years ago, that, with these two much debated rulings, the ECJ did indeed open Pandora's box and, if so, whether "all the evil of the world" came out of it, just like in the Greek myth of Pandora.

² R. Caranta, 'Nuove questioni su diritto comunitario e forme di tutela giurisdizionale', *Giur. It.*, 1993, Vol. 3A, 657.

³ Case C-236/92, *Comitato di Coordinamento per la Difesa della Cava and others v. Regione Lombardia* [1994] ECR I-00483.

⁴ R. Caranta, *supra* note 2, 660. Please note that the translation does not have official character.

⁵ M. Claes, *The National Courts' Mandate in the European Constitution* (Hart, 2005).

⁶ Case C-224/01, *Gerhard Köbler v. Austria* [2003] ECR I-10239.

2. State liability for violations of EC law committed by national supreme courts

As is well known, the ECJ's ruling in the *Köbler* case extended the principle of State liability also vis-à-vis the judiciary. On the basis of the principle of effective judicial protection, the ECJ held that Member States may be called upon making good damages suffered by individuals as a result of a violation of EC law committed by national courts adjudicating at last instance. Although ruled with specific reference to a case litigated before the Austrian courts, the outcome of the *Köbler* case can be of great significance for the Italian legal system, because it calls in question one of the founding principles governing the activity of the judiciary, namely the exclusion of liability for errors committed when interpreting the applicable law.

In the Italian legal system, State liability for judicial errors is governed by Law of 13 April 1988 No. 117 ("Law No. 117/88"), which is applicable to the activities of all courts, including therefore administrative courts⁷. This law was passed after a referendum with which the previous regime of liability was repealed. Before the referendum, the liability for judicial errors was governed by Articles 55, 56 and 74 of the Code of Civil Procedure, pursuant to which an unlawful behaviour of a judge could never give rise to liability for the State, but only for the judge him/herself. Moreover, the judge could be held personally liable only if he/she had violated the law intentionally, or if he/she was found guilty of fraud or corruption.

The main change introduced with Law No. 117/88 is the shift of focus of the liability from the judge to the State. Moreover, pursuant to this law the liability of the State for judicial errors can arise in cases in which the court has acted and breached the applicable law intentionally or with gross negligence. However, the liability of courts can never arise in cases concerning the activity of interpretation of the applicable law, the fact-finding activity or the evaluation of evidence⁸. This limitation of liability finds its

⁷ Article 1 of Law of 13 April 1988 No. 117. The text of this law can be found at http://www.giustizia.it/cassazione/leggi/1117_88.html.

⁸ Article 2 of Law No. 117/88. For a general comment on this law, see R. Conti, 'Giudici supremi e responsabilità per violazione del diritto comunitario', *Danno e Resp.*, 2004, 32 ff.

rationale in the constitutional guarantee of independence of the judiciary⁹. In this respect, the Constitutional Court did not doubt the constitutionality of these rules and, indeed, considered that the constitutional independence of the judiciary implies a necessity to guarantee an adequate degree of autonomy in evaluating the facts and the evidence, and of impartiality in interpreting the law¹⁰.

Assuming that these provisions would be applied also to cases of a claim for compensation against the State for damages suffered as a result of a violation of EC law committed by judicial authorities¹¹, it is necessary to consider whether, in the light of the *Köbler* ruling, they respect the principle of effective judicial protection, as elaborated by the ECJ's case law.

Before analysing the compliance with EC law of the Italian rules, it is interesting to note that the Italian judges already thought of this problem of compatibility themselves: in a case that resembles in many ways the factual situation at stake in *Köbler*, the Civil Court of Genoa asked the ECJ to express its opinion on the Italian rules concerning the exclusion of liability for cases of errors not committed intentionally or with gross negligence, and for errors related to the interpretation of the law and the evaluation of facts¹². On 11 October 2005, Advocate General Léger issued his opinion on the matter¹³ and on 13 June 2006 the ECJ delivered its judgment on the matter¹⁴.

⁹ Article 104 of the Italian Constitution.

¹⁰ Corte Cost., 18 January 1989, No. 18, *Giust. Pen.*, 1990, I, 23.

¹¹ The abstract applicability of Law No. 117/88 also to cases concerning EC law was affirmed by the Civil Court of Rome on the basis of the principle of national procedural autonomy, pursuant to which, once a violation of EC law is established, the procedural conditions on which State liability may be enforced are governed by national law. Trib. Roma, 28 June 2001, *Mediobanca-Banca di Credito Finanziario S.p.A. e Vincenzo Maranghi v. Repubblica Italiana*, *Giur. Merito*, 2002, 360. Please note that this case was decided before the ECJ's ruling in *Köbler*.

¹² To be completely accurate, it must be pointed out that the question was sent to the ECJ before the ruling in *Köbler* was issued and contained also a further question, concerning in general the existence of a principle of State liability for damages suffered by individuals for violations of EC law committed by national supreme courts. In the light of the ruling in *Köbler*, this question was withdrawn so that only the more specific question concerning the Italian rules was kept before the ECJ.

¹³ Opinion of Advocate General on case C-173/03, *Traghetti del Mediterraneo SpA v. Italian Republic* [2006] ECR 00000.

¹⁴ Case C-173/03, *Traghetti del Mediterraneo SpA v. Italian Republic*, [2006] ECR 00000.

It is worth emphasising that the circumstances of the *Köbler* case are very similar to those at stake before the Italian Civil Court, apart from the fact that the story does not take place in the Austrian Alps, but in the sunny harbours of Genoa and Naples. In the Italian case, a company operating ferries (*Traghetti del Mediterraneo*) had requested compensation from a competitor company (*Tirrenia*), on the ground that the latter had dumped its fares in the transport activities between continental Italy and Sicily and Sardinia, because, the applicant argued, the competitor had obtained State aid, which, in its view, was in violation of the relevant rules of EC law.

All courts up until the Court of Cassation rejected the claim and considered that the State aid in question was not in violation of EC law. All courts, moreover, denied the applicant's request for a preliminary question to be referred to the ECJ, considering that the relevant EC rules had already been sufficiently interpreted by the European court. After the ruling of the Court of Cassation in last instance, however, the European Commission decided to open a proceeding against *Tirrenia* and issued a decision highlighting the conditions which the aid in question should fulfil in order to be considered compatible with the EC Treaty.

The company then brought a liability claim to the Civil Court of Genoa against Italy for the erroneous judgment issued by the Court of Cassation, arguing that, if the Court of Cassation had duly requested the ECJ to become involved in the dispute via the preliminary reference tool, the outcome would have been in its favour, especially in the light of the later Commission decision. Italy contested this claim arguing that, pursuant to the rules of Italian law mentioned above, there can be no liability in such cases since the error occurred in the context of the interpretation of the applicable law. To this statement the company replied that these procedural rules are in breach of EC law, because they render the exercise of Community rights impossible in practice.

Therefore, the Italian court, very wisely, decided to stay proceedings and refer the ECJ a question concerning the compatibility of the relevant Italian rules with EC law. More in particular, the Italian court asked whether the rules providing for the exclusion of State

liability for judicial errors falling within the scope of the activity of finding the facts and interpreting the applicable law, and anyway for those errors that are not a result of intention or gross negligence, are, indeed, to be considered in breach of the principle of effective judicial protection.

Preliminarily, it should be stressed that the conclusions of Advocate General Léger should not come as a surprise and, instead, they quite straightforwardly follow from the previous case law of the ECJ on State liability¹⁵. Indeed, the Advocate General recalled that several objections were raised against the principle set out in *Köbler* (such as the independence of the judiciary, the authority of *res iudicata* and so on) and that the ECJ dismissed all these arguments. From this basis, he concluded that a rule such as that at stake (excluding State liability when the error of the court is connected to the interpretation of the law and the fact-finding activity) basically deprives of all effects the ruling in *Köbler*, since it is exactly in those circumstances that most often a violation of EC law by the supreme courts is likely to occur¹⁶. As far as the limitation connected to the intentional or grossly negligent nature of the error, the Advocate General recalled the ruling of the ECJ in *Köbler*, where it was held that the liability arises where the error was committed in “manifest violation” of the applicable law. Cautiously, the Advocate General concluded that the requirement of intention or gross negligence is not in breach of effective judicial protection per se, but it cannot be interpreted as setting a higher threshold than the one of the “manifest violation of the applicable law”¹⁷. This conclusion does not seem to be innovative, since Advocate General Léger had highlighted already in *Köbler* that the concepts of intention or gross negligence may have different meanings in the various Member States and may imply a too heavy burden of proof on the individual, thus expressing his preference for a more objective criterion based on the manifest nature of the violation.

¹⁵ See cases C-46/93 and 48/93, *Brasserie du Pêcheur SA v. Germany* and *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029.

¹⁶ Opinion of Advocate General, in particular para. 64.

¹⁷ Opinion of Advocate General, para. 102.

The ECJ fully endorsed the Advocate General's Opinion and rules that the exclusion of liability for errors committed by national supreme courts when interpreting the law and assessing the facts and the evidence is to be considered in breach of EC law. Concerning the requirement of intention or gross negligence, the ECJ did not explicitly deal with the Italian rules at stake, but reinstated that the threshold for liability cannot be higher than the one of "manifest violation of the applicable law".

In the light of the ruling in *Köbler* and *Traghetti*, it is essential to assess if and to what extent the relevant Italian rules comply with the principle of effective judicial protection. It is well-established, indeed, that the procedural conditions with which individuals can bring a liability claim against the State in the national courts, are governed by national rules. This means that individuals who wish to bring a claim for compensation against the Italian State for an alleged violation of EC law committed by an Italian court adjudicating at last instance should do so according to the procedural modalities provided for in Law No. 117/88. However, these rules may only be applied by the national courts provided that they comply with the principles of equivalence and of effectiveness¹⁸.

As regards the principle of equivalence, it can be observed that Law No. 117/88 does not discriminate between claims based on EC law and claims based on national law and hence seems in compliance with the ECJ's case law on domestic remedies. A different conclusion must be drawn, however, with regard to the principle of effectiveness. The two limitations of liability discussed above are considered in turn. In relation to the subjective element of liability, it must be pointed out that the ECJ's ruling in *Köbler* did not consider intention or gross negligence as essential prerequisites for liability, but rather as elements to be taken into account to assess the gravity of the violation of EC law committed by the court¹⁹. Therefore, the Italian rule that provides that only errors committed with intention or gross negligence can give rise to liability, seems to be in breach of EC law. However, in *Traghetti* the ECJ added that this rule is not in violation

¹⁸ See cases 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989; case 45/76, *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043; case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v. Belgium* [1995] ECR I-4599.

¹⁹ *Köbler*, para. 55.

of Community law per se, as long as it is not interpreted as setting a higher threshold than the one of “manifest violation of the applicable law”²⁰. It could therefore be possible to consider this provision in compliance with EC law, so long as it could be interpreted in a “Community-friendly” way. Pursuant to Article 2(3)(a) of Law No. 117/88, gross negligence includes also a serious violation of law determined by an inexcusable error: the concept of gross negligence could be interpreted as including also the cases of violation of EC law, thereby saving this rule from the “European scythe” and at the same time respecting the European standards of protection²¹.

The other rule at stake, relating to the exclusion of liability for errors committed in the interpretation of the law and in the fact-finding activity cannot, however, be interpreted in a way consistent with the ECJ’s rulings in *Köbler* and in *Traghetti*²². As the Advocate General pointed out in his opinion in *Traghetti*, indeed, this rule turns the principle of State liability into an empty shell, since it is exactly when interpreting the law that most often a violation of EC law would occur²³. This means that, in order to comply with the principle of effective judicial protection, this Italian rule would need to be set aside by the national courts when a claim is brought for an alleged breach of EC law committed by an Italian court adjudicating at last instance.

As a consequence, notwithstanding the national procedural rules, under the regime of liability set out by the ECJ, the Italian State would be held liable to pay compensation to an individual if a court adjudicating at last instance misinterpreted EC law because of an inexcusable error. It appears hard to predict how the Italian courts will react to the idea of the limitation of liability being swept away by the ECJ. One of the greatest difficulty in the reception of the newly set Community standards will be the usual and well-known problem of the creation of a double standard of protection according to the source of

²⁰ *Traghetti*, para 44.

²¹ R. Conti, *supra* note 8, 35. See also G. Di Federico, ‘Risarcimento del singolo per violazione del diritto comunitario da parte dei giudici nazionali: il cerchio si chiude?’, *Riv. Dir. Int. Priv. Proc.*, 2004, 155.

²² For an attempt, though rather vague, of a Community-friendly interpretation of this Italian rule, see R. Conti, *supra* note 8, 36; for the non applicability altogether of Law No. 117/88, see E. Scoditti, ‘Francovich presa sul serio: la responsabilità dello Stato per violazione del diritto comunitario’, *Foro It.*, 2004, IV, 4.

²³ Opinion of Advocate General, in particular para. 64.

individuals' rights²⁴. In this way, individuals claiming compensation for a judicial error infringing on rights derived from EC law would be allowed to profit from less strict procedural conditions than individuals whose domestic rights have been allegedly infringed. For this reason, a legislative intervention seems to be appropriate, in order to adapt the relevant national rules to the ECJ's prescriptions. In the meantime, it would be advisable, in application of the principle of equality, that national courts afford the same (less strict) treatment also to individuals founding their claims merely on national law.

3. Revocation of final administrative measures adopted in violation of EC law

The *Kühne & Heitz* case is of exemplary importance for the analysis of the "Community mandate" incumbent upon administrative authorities.

The case concerned the claim brought by *Kühne & Heitz*, a company exporting poultry meat parts, against the Dutch customs authorities. In the declarations lodged with these authorities, *Kühne & Heitz* designated its goods as falling under a certain subheading of the customs tariff. On the basis of those declarations, it was granted export refunds. Subsequently, however, the customs office reclassified the goods under a different subheading and ordered the company to give back large sums of money. An appeal by *Kühne & Heitz* against this decision was dismissed without any question being raised under Article 234 EC as to the proper meaning of the relevant subheadings of the customs tariff. Some time later, however, the ECJ did rule upon the subheadings in question and interpreted the provisions in a manner which implied that the company should not have had to repay the refunds granted. Following that judgment, *Kühne & Heitz* asked the customs authority for the payment of the refunds which the latter had, in its view, wrongly required it to reimburse. Confronted with a refusal, the company brought a claim against the customs office. The competent Dutch court asked the Court of Justice whether under Community law, in particular under Article 10 EC, an administrative body is required to reopen a decision which has become final in order to

²⁴ M. Magrassi, 'Il principio della responsabilità risarcitoria dello Stato-giudice tra ordinamento comunitario, interno e convenzionale', *Dir. Pubbl. Comp. Eur.*, 2004, 500; A. Damato, 'Cancellato il limite che subordina l'azione alla dimostrazione del dolo o colpa grave', *Guida al Dir.*, 4/2006, 39.

ensure the application of Community law, as it is to be interpreted in the light of a subsequent preliminary ruling.

In its judgment, the ECJ held that the principle of loyal cooperation entails the duty for national authorities to re-examine a final administrative decision, where an application for such review is made to it, in order to take into account a ruling of the ECJ, even after the decision has acquired the quality of *res iudicata*. However, according to the European Court, this duty arises only provided that some requirements are met, namely that (i) under national law, the authority in question has the power to reopen that decision; (ii) the administrative decision in question has become final as a result of a judgment of national court ruling at final instance; (iii) the judgment is, in the light of a later decision given by the ECJ, based on a misinterpretation of Community law; and (iv) the person concerned complained to the administrative body “immediately after” becoming aware of that decision of the European Court.

Under Italian administrative law, the possibility for the administration to re-examine its own decisions falls within the scope of the category of the so-called “*autotutela*”. There seems to be no adequate translation for this term in English: however, Galetta, an Italian administrative law scholar, during a presentation held at the European University Institute, used the term “administrative self-remedy”, which is adhered to in this paper²⁵.

First of all, it seems necessary to point out that, unlike many other countries, for a very long time there has been no explicit legislative support for the powers of administrative self-remedy. However, it has always been undisputed that Italian administrative authorities do have the power to come back to their previously adopted decisions. This power has been codified only less than a year ago²⁶. The absence, for many years, of statutory rules on administrative self-remedy has brought about the consequence that the

²⁵ An account of this debate can be found at page 48 of the round table proceedings that can be retrieved at <http://www.iue.it/PUB/law05-10.pdf>.

²⁶ Article 21-*nonies* of Law of 7 August 1990, No. 241, as modified by Law of 11 February 2005, No. 15. The latest version is to be found at http://www.giustizia.it/cassazione/leggi/l241_90.html#TESTO.

criteria and requirements for its exercise could only be found in the case law of the Council of State.

Under Italian administrative law, there are two main types of decision of self-remedy: the *revoca* and the *annullamento d'ufficio*. For the purposes of the present analysis, the focus is to be placed on the second of these two tools, since the *revoca* can be used by the administrative authorities when the decision is valid but no longer fulfills the public interest objectives it was meant to pursue.

The *annullamento d'ufficio*, which can be translated with the term “administrative annulment”, is subject to two preconditions: (i) the measure to be annulled must be invalid and (ii) there should be a real and concrete interest in the annulment. With the latter requirement reference is made to the fact that it is not enough that the measure to be annulled is invalid, since the authority must also consider if there is a public interest that specifically requires the annulment and that prevails over other conflicting interests, such as legal certainty²⁷.

The *Kühne & Heitz* ruling seems to have an impact on three different aspects of the Italian rules on administrative self-annulment. These aspects are analysed in turn.

3.1 Discretion vs. obligation to annul

The first aspect in relation to which the *Kühne & Heitz* ruling could potentially clash with the relevant Italian rules, concerns the second of the two requirements necessary for an administrative authority to annul its own decisions, namely that there should be a real and concrete public interest in the annulment. More in particular, the question arises whether this requirement applies also when the administrative measure is invalid because of a violation of EC law, or whether, because of the supremacy of EC law and the duty of loyal cooperation, the administrative annulment should not be subject to a discretionary

²⁷ In general on the administrative annulment see F. Benvenuti, *Autotutela*, *Enc. Dir.*, IV (Milano, 1959), 537 ff.

assessment of conflicting interests and should instead be seen as an obligation to annul the invalid measure on the part of the authorities.

The argument according to which the authorities should *always* proceed to the administrative annulment of a measure in violation of EC law (regardless of the weighing up of conflicting interests) was upheld by the Council of State²⁸. In particular, the Council of State has held that, in case of invalidity deriving from the violation of EC rules, the public interest in the annulment of the measure is not only to be considered as always prevailing over all other private interests in the preservation of the measure, but also as inherent in the invalidity of the measure. In such cases, therefore, there should be no need to carry out the balancing exercise between the public interest in the removal of the measure and the private interests in its preservation.

The opposite thesis, according to which administrative authorities should always verify whether there is a public interest in the annulment of the measure (also when the measure is breach of EC law) is supported by another line of case law and accepted by some scholars²⁹. The ruling in *Kühne & Heitz* now seems to give support to the thesis according to which EC law does not require an authority to necessarily annul a final administrative measure where it appears that this measure violates EC law. What the ECJ set out, indeed, is a duty to re-examine final administrative measures, but *not* a duty to annul them³⁰. In other words, the mere fact that the measure is in violation of EC law does not imply, in the Court's view, that the authorities have to annul the measure; on the contrary, the ECJ clarified that the administrative annulment remains subject to a balancing exercise with the other conflicting interests.

²⁸ Cons. Stato, Sez. IV, 18 January 1996, No. 54, *Riv. It. Dir. Pubbl.Com.*, 1997, 117; Cons. Stato, Sez. V, 18 April 1996, No. 447, *Riv. It. Dir. Pubbl.Com.*, 1997, 186; Cons. Stato, Sez. IV, 5 June 1998, No. 918, *Urb. e App.*, 1998, 1343.

²⁹ TAR Lazio, Sez. III, 7 October 1996, No. 1834, *Urb. e App.*, 1997, 332; R. Garofoli, 'Annullamento di atto amministrativo contrastante con norme CE self-executing', *Urb. e App.*, 1997, 340; R. Garofoli, 'Concessione di lavori: discrezionalità del potere di annullamento d'ufficio e vincoli comunitari', *Urb. e App.*, 1998, 1344. More recently, see also S. Valaguzza, 'La concretizzazione dell'interesse pubblico nella recente giurisprudenza amministrativa in tema di annullamento d'ufficio', *Dir. Proc. Amm.*, 2004, 1261; D. De Pretis, 'Illegittimità comunitaria' dell'atto amministrativo definitivo, certezza del diritto e potere di riesame', *Giorn. Dir. Amm.*, 2004, 727.

³⁰ A. Massera, 'I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario', *Dir. Amm.*, 2005, 743.

This is surely not surprising: in fact, it would have been surprising if the Court had declared the existence of an absolute duty for the authorities to annul measures in breach of EC law, since the Court itself, with reference to the administrative self-remedy powers of the Community institutions, has opted for a system of discretion as to whether an invalid measure should be subject to administrative annulment. More in particular, the ECJ has held, already as early as 1967 in the famous *Algera* case, that administrative annulment can only be carried out within a reasonable period of time³¹. Concerning the weighing up of interests, the Court held in *S.N.U.P.A.T.* that the mere invalidity of a measure is not enough for the Community institutions to proceed to its annulment and that, instead, the administrative annulment by Community institutions should always follow an evaluation of the public interest in the annulment and its weighing up with the conflicting private interests involved³².

Therefore, it is time for the Council of State to revise its approach to the obligation to annul an administrative decision when EC law was violated and, place more importance, as the ECJ itself does and has clearly stated in *Kühne & Heitz*, on the private interests involved, and in particular on the legitimate expectations of all concerned parties³³.

3.2 *The scope of res iudicata*

Apart from the debate concerning the discretionary nature of the administrative annulment when EC law is at stake, the ruling in *Kühne & Heitz* may have an impact on Italian law also from a second perspective. Indeed, it is settled case law³⁴ that the power of the administration to re-examine and annul its decisions cannot be exercised in those cases in which the measure has been subject of an action for annulment, it has been

³¹ Joined cases 7/56, 3/57 to 7/57, *Algera v. Common Assembly of the European Coal and Steel Community* [1957] ECR 00039. The same was held also in case 15/85, *Consorzio Cooperative d'Abruzzo v. Commission* [1987] ECR 1005 and in case 14/81, *Alpha Steel Ltd. v Commission* [1982] ECR 749.

³² Joined cases 42 and 49/59, *S.N.U.P.A.T. v. High Authority of the European Coal and Steel Community*, [1961] ECR 00053; more recently, Case C-90/95, *de Compte v. European Parliament* [1997] ECR I-01999; case C-229/88, *Cargill BV and others v. Commission* [1990] ECR I-01303.

³³ Of the same opinion S. Valaguzza, *supra* note 28, 1267.

³⁴ *Ex multis*, Cons. Stato, Sez. V, 12 March 2003, No. 3965, *Foro Amm.*, CDS, 2003, 2234.

considered valid and this ruling has become *res iudicata*³⁵. If this seems quite straightforward, it is not so when looking at the details.

First of all, there is still debate as to whether a ruling of rejection of an action for annulment is suitable at all to create a *res iudicata*. The Council of State, indeed, argued that a ruling of rejection of the applicant's claim for annulment cannot become *res iudicata* in a substantial sense, since it does produce any constitutive or innovative effects vis-à-vis the legal relationship between the parties, but it simply declares ungrounded the claim brought by the individual³⁶. If this line of interpretation is to be followed, the consequence is that it is always possible for the administration to annul a measure that has been the subject matter of a judicial claim, since the *res iudicata* problem does not stand in the way³⁷.

This view is opposed by the majority of scholars and of the case law, who argue that there should be no difference between a ruling which upholds and a ruling which rejects the applicant's claim, since the value of *res iudicata* cannot change and mutate according to the content of the court's ruling. For those who support this view, therefore, the power of authorities to annul administrative measures is limited to those parts of the measure, which have not become *res iudicata*³⁸.

This raises then a second problem, connected to the limits of the *res iudicata*. Namely, the question arises as to whether the *res iudicata* of rejection covers all grounds that could possibly be related to the measure or only those grounds brought forward by the applicant. Some case law seems to extend the *res iudicata* to all possible grounds of unlawfulness of the challenged measure, applying by analogy the rule concerning the extension of the *res iudicata* in civil disputes³⁹. This brings about the consequence that

³⁵ With the expression *res iudicata* reference is made to the principle according to which a final judgment of a competent court is conclusive upon the parties and can no longer be modified.

³⁶ Cons. Stato, Sez. VI, 21 February 1997, No. 305, *Cons. Stato* 1997, I, 283.

³⁷ Cons. Giust. Amm., 4 July 1986, No. 97, *Cons. Stato*, 1986, I, 1030.

³⁸ M. Nigro, *Giustizia amministrativa* (Bologna, 2002), 323.

³⁹ Cons. Stato, Sez. IV, 14 September 1984, No. 678, *Cons. Stato*, 1984, I, 1022; Cass. Civ., Sez. Un., 6 May 1998, No. 4573, *Giust. Civ.*, 1999, I, 211.

the power of administrative annulment is *de facto* excluded, since the *res iudicata* is given the widest possible meaning.

The opponents to this view argue that the *res iudicata* and the grounds of unlawfulness brought forward by the applicant before the court should coincide, hence the administrative authorities should be allowed to re-examine administrative measures that have been subject to a ruling of rejection, but this powers can be exercised only in relation to those grounds which are not dealt with in the ruling, since they are not covered by the *res iudicata*⁴⁰.

If this view is to be adopted, one is then faced with a third problem: in a case such as that at stake in *Kühne & Heitz*, is the individual relying on a new ground or on the same ground of unlawfulness of the contested measure? In other words, if the contrast between the administrative measure and the underlying norm has been denied by the courts with a final judgment, but becomes apparent because of a later ruling of the ECJ, does this contrast create a new ground of unlawfulness, different from the one brought forward by the applicant and examined by the court, or is the applicant still relying on the same ground of unlawfulness?

Now, it must be considered that in the Italian system of administrative procedural law the judge is bound to adjudicate only on those grounds of unlawfulness which have been duly and timely brought forward by the applicant. However, in application of the principle of *iura novit curia*⁴¹, it must be considered that within those grounds of unlawfulness, it must be the judge *ex officio* who finds the applicable law. Therefore, where the contrast between an administrative measure and the law arises after a judgment of the ECJ and this contrast has been previously denied by a national court, the administrative authorities

⁴⁰ M. Nigro, *supra* note 36, 324.

⁴¹ According to this principle the judge is obliged to find and be bound by the appropriate legal rule also without prompting from the parties.

are confronted with the same ground of unlawfulness as that adjudicated upon by the court, since it concerns the activity of finding the applicable law⁴².

Therefore, it must be concluded that according to Italian law it is not possible for the national authorities to re-examine an administrative measure which has been the subject matter of a judicial claim as far as the same aspects adjudicated upon are concerned. The phrase “same aspects” includes, on the basis of the principle *iura novit curia*, also a new interpretation of the law on which the contested measure is based.

This conclusion shows the potential effects that *Kühne & Heitz* could have on the Italian legal system, since the ECJ’s ruling seems to suggest that sufficient precondition for the obligation to re-examine an administrative measure in breach of EC law is the mere and unqualified existence of the power for the authorities, under national law, to carry out this re-examination. This means that, on the one hand, the ruling of the ECJ is applicable in the Italian legal system, because the Italian rules do grant in principle the power to administrative authorities to re-examine their decisions; on the other hand, however, there seems to be a conflict between Italian law and the ECJ’s ruling because, under Italian law, authorities are not allowed to reopen decisions on the same grounds on which there has already been a ruling and a *res iudicata* thereon.

It thus essential to find out whether there is a way to reconcile this contrast between Italian law and the ruling in *Kühne & Heitz*. One way to tackle the problem would be to establish a comparison between the situation of a ruling of the ECJ that clarifies the meaning of an EC provision with the situation of a national law that clarifies the meaning of an earlier law (so-called *leggi di interpretazione autentica*). These situations seem to be comparable, since in both cases a subsequent act is issued in order to clarify the meaning of a precedent rule. This comparison may be useful for the purposes of the present analysis, because both the Council of State and the Constitutional Court have

⁴² G. Mari, ‘La forza di giudicato delle decisioni dei giudici nazionali di ultima istanza nella giurisprudenza comunitaria’, *Riv. It. Dir. Pubbl. Com.*, 2004, 1045.

dealt with the relationship between the *res iudicata* and a law that retroactively clarifies the meaning of an earlier law.

In this respect, the Council of State has argued that the *res iudicata* cannot be touched by a later law that, with retroactive effects, interprets the rules on the basis of which the *res iudicata* was formed. The opposite conclusion would, in the court's view, basically allow the legislator to undo at any point what the judiciary has done and would render judicial protection uncertain⁴³. This view was also confirmed by the Court of Cassation⁴⁴.

Also the Constitutional Court intervened on this matter and it took a different position. In particular, the Court considered that the *res iudicata* is not and should not be immune from the balancing of conflicting interests that the Court itself constantly applies⁴⁵. Therefore, also the strength of *res iudicata*, in the Court's view, can and should be compressed and by-passed by a retroactive interpretive law, when there are other interests (conflicting with the principle of legal certainty), which should be granted protection. In other words, according to the Constitutional Court, the obligation to respect the authority of *res iudicata* and, therefore, also the powers constitutionally granted to the judiciary, do not automatically prevail over other values, but must always be subject to a balancing exercise.

If this was stated in relation to a civil law case, hence a case in which the ruling satisfied the demands of one of the parties, it should *a fortiori* apply to situations in which the *res iudicata* was formed on a ruling of rejection of the annulment of a measure imposing obligations on the individual. If seen from this perspective, the ruling contained in *Kühne & Heitz* is probably not as revolutionary as it might have looked at first sight, and can be reconciled without too big a friction with the national rules.

⁴³ Cons Stato, Ad. Plen., 21 February 1994, No. 4, *Foro It.*, 1994, III, 313.

⁴⁴ Cass. Civ., Sez. Lav., 11 April 2000 No. 4630, *Giust. Civ. Mass.*, 2000, 786.

⁴⁵ Corte Cost., 10 November 1994, No. 385, *Giust. Civ.*, 1995, I, 46; in the same sense Corte Cost., 30 December 1994, No. 461, *Giur. Cost.*, 1994, fasc. 6.

One last point deserves to be mentioned: while in case of a law clarifying the meaning of an earlier law with retroactive effect the weighing up of conflicting interests is carried out by the legislator once and for all and is then only subject to the constitutional review, in the scenario set out by *Kühne & Heitz* it is up to the authorities, on a case-by-case approach, to weigh up the applicant's interest connected to the request of re-examination of the decision and the conflicting interest of legal certainty and the interests of third parties. If and how this is going to work in the future remains to be seen.

3.3. Discretion vs. obligation to reopen

Finally, the ECJ's ruling in *Kühne & Heitz* can have an impact on the Italian rules on administrative annulment from a third point of view, apart from, firstly, the aspect of the discretion versus obligation to annul administrative measures adopted in violation of EC law, and, secondly, the possibility to by-pass the *res iudicata*.

The analysis carried out above shows that, in relation to the first aspect discussed, not only does the ruling in *Kühne & Heitz* not bring any changes in the Italian legal system, but the ruling seems even to set a lower level of protection for individuals. Concerning the second of the aspects analysed, as explained above, there seems to be a contrast between the domestic rules and the standards of protection set out by the ECJ; however, this contrast could be solved if the ECJ's preliminary rulings are considered as laws retroactively clarifying the meaning of an earlier law.

However, even considering that, by using this interpretation, the ECJ's ruling could fit into the national existing schemes, there is still one major problem with the outcome of *Kühne & Heitz*.

From the ruling in *Kühne & Heitz* it seems that, while the Court did not set out a duty for the authorities to annul measures in breach of EC law, it did impose on national authorities an obligation to re-examine measures which have become final, when EC law has allegedly been violated.

Now, under Italian law the individual does not hold a right to compel the administration re-examine its measures, but a mere interest⁴⁶. On this point the case law is consolidated: the refusal by the administration to re-examine its decisions cannot be sanctioned by courts and the individual whose application has been rejected or ignored by the authorities cannot bring any claim against the administration⁴⁷. This means that, following the ruling in *Kühne & Heitz* the Italian authorities can be considered obliged to re-examine their measures, where the invalidity of the measure is allegedly based on EC law. Again, this may lead to two different standards of protection and may, possibly, contribute to trigger a spill-over effect.

4. Conclusion

It is now possible to draw some conclusions from the analysis carried out above and assess whether, with the *Köbler* and the *Kühne & Heitz* rulings the ECJ did indeed open Pandora's box, which Caranta referred to, and what came out of it for the Italian system of administrative justice.

In relation to the *Kühne & Heitz* jurisprudence, the author's impression is that Pandora's box has not been opened, since, in the light of the above analysis, it can be argued that this ruling probably looks more revolutionary than indeed is, and can be reconciled with the relevant Italian rules. The only point that could create friction, as was mentioned above, concerns the existence of a duty for the administration to re-examine previously adopted decisions. However, already before the ECJ's ruling, this point was a subject matter for debate: *Kühne & Heitz* could then work as necessary input to trigger a change in the Italian rules⁴⁸.

⁴⁶ Apart from very limited exceptions, mainly concerning tax law matters. For this aspect see S. Muscará, *Autotutela (diritto tributario)*, *Enc. Giur. Treccani* (Roma, 1999), 1 ff.

⁴⁷ Cons. Stato, Sez. V, 2 February 2002, No. 1810, *Foro Amm.*, CDS, 2002, 912.

⁴⁸ On this point see D. U. Galetta, 'Autotutela decisoria e diritto comunitario', *Riv. It. Dir. Pubbl. Com.*, 2005, 55-56; E. Rinaldi, 'Miracoli dei polli olandesi: la *primaauté* del diritto comunitario va "oltre" il giudicato nazionale "anticomunitario". E all'Amministrazione spetta il compito di rimediare...', *Riv. It. Dir. Pubbl. Com.*, 2005, 664.

As far as the *Köbler* ruling is concerned, it seems, instead, that Pandora's box has indeed been opened. This is demonstrated by the request for preliminary ruling sent by the Court of Genoa and the ECJ's ruling in *Traghetti*, which shakes the very basis of the national regime of liability for judicial errors, namely the exclusion of liability for errors committed when interpreting the law⁴⁹. Indeed, as shown above, under the new regime of liability, all misinterpretations of EC law committed by Italian courts adjudicating at last instance could potentially give rise to State liability, provided that the misinterpretation arises out of an inexcusable error. If Pandora's box has been opened, it is submitted, however, that definitely not all the evil of the world came out of it for the Italian legal system. On the contrary, the ECJ's ruling that State liability cannot be excluded for errors committed in the interpretation of the law and in the fact-finding activity could probably contribute to make the Italian judges more aware of EC law and the obligations it entails.

More in general, it is submitted that these two cases may serve as good examples of the impact of the European jurisprudence on domestic remedies in the Italian legal system: where the national rules already provide for an adequate standard of protection, the European case law does not bring about radical changes to the existing law. Where, instead, the domestic procedural conditions do not allow for an adequate protection of individuals' rights, the ECJ's case law brings about a wind of change that, after some initial shock, is acknowledged as being beneficial and does eventually trigger changes also in the procedural conditions provided for merely domestic claims⁵⁰.

⁴⁹ Of the same opinion L. de Bernardin, 'La normativa italiana in tema di responsabilità civile del magistrato a rischio davanti ai giudici di Lussemburgo' in www.giustamm.it.

⁵⁰ Most notably, this has happened in the context of the power of the administrative judge to grant positive interim measures.

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